United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

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Date: October 6, 1997

Case No. **95 INA 476**

In the Matter of:

SCARSDALE SYNAGOGUE/TREMONT TEMPLE,
Employer,

On behalf of

MANUEL ROJAS,
Alien.

Appearance: C. A. Grutman, Esq., of New York, New York.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MANUEL ROJAS (Alien) by SCARSDALE SYNAGOGUE/TEMPLE (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been

met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

STATEMENT OF THE CASE

On April 1, 1993, Employer, Scarsdale Synagogue/Temple, filed for labor certification on behalf of the Alien, Manuel Rojas, to fill the position of Sexton. AF 04. The Employer's experience requirement for this job was two years. After the Employer received eight job applications from U. S. workers, it reported reasons it had rejected each of the U.S. applicants by its letter of February 4, 1994. Inter alia, it rejected John Beatty because he had never worked in a job requiring a knowledge of cleaning and his background was in maintenance, and for the further reason that he did not have experience setting up a synagogue. A second job seeker, Antonio Acevedo, was rejected because he failed to respond to several telephone calls contacts and a follow up letter. AF 73.

The Employer stated the following duties in describing the Job to be Performed in Part 13 of the application:

> Take care of church buildings and furnishings. Perform cleaning and routine maintenance duties in church and auxiliary buildings and in churchyard. Take care of vestments and sacred vessels, prepare altar for religious services according to prescribed rite. Open and lock church before and after services and other church activities. Tend furnace and boiler to provide heat, maintain and regulate air conditioner. Perform minor and routine painting, plumbing, electrical wiring and other related maintenance activities. Clean snow and debris from walks. Order cleaning supplies. May act as usher during services/ activities. Maintain and set up materials/decorations for services, e.g. candles, candlesticks, flowers for weddings, funerals and other religious celebrations.

The Employer required a grade school education and two years of experience in the Job Offered. AF 134. The Alien said he completed secondary school in Ecuador, and described all of his experience as self-employment in "Maintenance/Sexton/Janitorial" work from January 1, 1993, to February 13, 1993, the date of application. In addition to janitorial work similar to the duties stated in the job description, the Alien opened and locked church buildings during public hours and hours of attendance, provided usher services, and set up and cleaned decorations before and after services and activities. AF 135.

In the Notice of Findings (NOF) of December 23, 1994, the CO found Employer's requirement for two years' experience to exceed the qualifications that are normal for the performance of this job in the U. S. and in violation of 20 CFR § 656.21(b)(2). The CO noted that the Dictionary of Occupational Titles (DOT) fixed the criterion for training in the position of sexton as "short demonstration -- 30 days". The CO said the Employer could either amend the application to reduce the experience requirement to the DOT standard or prove that this experience requirement arises from a business necessity under 20 CFR § 656.21(b)(2)(i). The CO then stated the specific evidence that Employer was to file in order to establish the business necessity of two years as the required level of experience for this work.

The NOF accepted Employer's rejection of all U. S. job applicants other than Mr. Beatty and Mr. Acevedo. AF 105. The CO found Employer's rejection of Mr. Acevedo did not reflect good faith because he was told in a telephone interview that he would need a car for the job, and this was not a requirement that the Employer had stated in the either the job advertisement or the application. The NOF then concluded that Employer's rejection of Mr. Beatty was based on criteria that were inconsistent with the Act and regulations. Based on the evidence of record, the CO said Mr. Beatty had experience in both maintenance and the work of a sexton and that he was qualified under a job description that did not specify a requirement of experience in a synagogue. To rebut the NOF the Employer was required to provide further evidence that its rejection of these U. S. workers were valid good faith recruiting procedures. AF 105.

In Rebuttal, Employer said an experience requirement of two years mandated by (1) the size of the congregation, (2) the Employer's operation of a school, (3) the Employer's need to keep the facility open fourteen to sixteen hours a day, and (4) the lack of staff. Employer contended that it was unique in that it relies totally on the sexton and a custodian to handle all set up and cleaning functions. It argued further that in the absence of a supervisory staff to oversee the sexton, this position must be filled by a worker who is thoroughly familiar with their customs and practices. The Employer then noted the Alien had acquired such experience while working for a contractor that formerly had performed work for the synagogue.

Continuing its Rebuttal, the Employer said Mr. Acevedo had decided against applying for the position after he was informed of the location of the commuter train station and that the job would require him to work late hours on special occasions. The Employer contended that Mr. Beatty was not qualified because it perceived that "there is clearly a difference between someone who just knows maintenance and a person with a thorough knowledge of cleaning." By way of further information, Employer's Rebuttal

also included a list of Jewish holidays to show the peak demand for the work of the sexton, and said the synagogue's cleaning requirements were due to recent renovations. Employer again said it is not staffed to supervise and instruct maintenance employees in the use of industrial cleaners, solvents, and cleaning machines. AF 129.

The CO's Final Determination of February 3, 1995, rejected Employer's rebuttal evidence regarding the requirement of two years' experience. First, the CO found that the size of the congregation and the particular religious holidays associated with that congregation did not convincingly establish that an alteration is necessary in the DOT job description which does include the ability to carry out routine set-up and preparation for religious services and other events. The CO said Employer failed to establish that other comparably situated employers also require sextans working for them to have two years of experience on the job. The CO concluded that the Employer failed to prove that the sextans it employed currently or in the past were also required to have two years of experience.

The CO found, moreover, that the Employer did not establish a lawful job-related reason for rejecting Mr. Beatty, noting the Employer's rebuttal statement that he did not have the experience to perform special cleaning functions. The CO said that special cleaning functions had not been included in the job description, which it had limited to general and routine cleaning duties. The CO said the evidence that Mr. Beatty had the requisite experience was clearly demonstrated by his resume, noting he had two years of experience as a sexton. In summary, the CO concluded that the Employer had not demonstrated lawful and job-related reasons for rejecting Mr. Beatty, and denied Employer's application for alien labor certification. AF 130.

On March 14, 1995, Employer appealed. AF 145. In its August 1, 1995, brief the Employer argued that the business necessity for the experience requirement is established by its direct relation to complex duties that are specific to the religious services and to activities unique to Judaism, contending that the requirement is consistent with its experience with the sextans previously employed by the congregation. This argument extended the position expressed in Employer's request for reconsideration of the denial of certification, in which its president said that Mr. Beatty's rejection was related to the absence of appropriate religious background in his employment history, asserting at one point that

> [T]his requirement [of two years' experience] is related to the sophistication and sensitivity of the business because of the high level of responsibility entailing and involving complex duties related to specific religious services and activities unique to Judaism.

AF 145. The Employer conceded that its basis for rejecting Mr. Beatty was grounded on his failure to have the knowledge and experience in the area of Jewish religious observances, as the duties described in Part 13 of the application "are related to the care preparation, organization, and performance of 'religious services.'" AF 144 While the Employer agreed that the duties of the position it had described are normal for the position of sexton, it argued the business necessity of two years of experience on the job offered by contending that this work must be performed in a manner that is "sensitive to the employer's specific business needs." AF 143-144.

Discussion

1. 20 CFR § 656.21(b)(2) requires an employer to establish a business necessity for job requirements that are not normal for the occupation or that are not included in the DOT. An employer can establish business necessity of such qualifications as exceed the criteria of the DOT by proving that: 1) the job requirement bears a reasonable relationship to the occupation in the context of the employer's business; and 2) the requirement is essential to performing the job duties as described by the employer. **Information Industries, Inc**., 88 INA 082 (Feb. 9, 1989)(en banc).

The CO clearly stated in the NOF that the business necessity for a two year experience requirement rather than the thirty day experience requirement included in the DOT description of the work of a sexton could be accomplished by establishing that other similar situated employers require the same level of experience or that this Employer had hired other employees subject to the same experience requirement. The Employer did not submit any such documentation in its rebuttal. This Employer simply argued in general terms that the criterion it had stated was necessary.

Instead of addressing the directions of the NOF that it prove that a sexton's job duties at this synagogue are different from those set forth in the DOT, the Employer vigorously asserted a collateral Constitutional issue that had nothing to do with the facts it was told to prove in support of its case. The Employer did not assert a special job requirement of experience in Jewish religious observances until the argument was stated in Employer's brief for the first time. It follows that the reasons that the Employer belatedly presented cannot be considered. The reason is that where an employer's initial assertion of an argument occurs after the Final Determination has been issued, it cannot be considered on appeal because it was not before the CO for consideration. **Huron Aviation**, 88 INA 431(July 27, 1989).

While claiming in its brief that it had previously hired sextons with job requirements similar to those stated in its application, the Employer did not offer evidence in its Rebuttal to prove that fact. The NOF specified the documentation that the

Employer needed to establish the business necessity of the two years experience requirement, but the Employer failed to submit any such evidence in its Rebuttal, and merely argued in general terms that the requirement was necessary. As a result the Employer did not furnish any reason to accept the business necessity of its requirement of a period of experience that is twenty-four times greater than the term stated in the DOT. We affirm the CO's finding that the Employer failed to establish the business necessity of a two year experience requirement and conc--lude that the Employer did not establish its job requirements are normal for the U. S. within the meaning of 20 CFR § 656.21(b)(2). Consequently, we conclude that the alien labor certification Employer requested was properly denied for this reason.

2. In addition, however, under 20 CFR § 656.21(b)(6), an employer is required to establish that its rejection of the U. S. workers who applied for the position was based entirely on lawful job-related reasons, as 20 CFR § 656.20(c)(8) requires that the job must be open to any qualified U. S. worker.

In its brief, Employer states that applicant Beatty was rejected by Employer, in part, because he did not have experience with Jewish religious observances, a requirement which was not included in the application or advertisements. An Employer may not belatedly seek to add even more restrictive requirements and use them as a basis for rejecting a U.S. worker. **Metal Cutting Corp.**, 89 INA 090(Jan. 8, 1990). Employer has not established the U. S. applicant was rejected solely for lawful job-related reasons required 20 CFR § 656.21(b)(6). Accordingly, we find certification was properly denied for this further reason.[1]

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[1]Because we find certification properly denied for the reasons set forth above, the Employer's further assertions regarding its rejection of Mr. Beatty because his experience was in maintenance rather than in cleaning need not be addressed.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 476

SCARSDALE SYNAGOGUE/TEMPLE, Employer,
MANUEL ROJAS, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: September 10, 1997